March 13, 2019

VIA ECFS

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992, MB Docket No. 05-311

Dear Ms. Dortch:

The cable industry continues to support the Commission's efforts in this proceeding to clarify the limits Congress has established on state and local franchise authorities' ability to regulate the operation of cable systems.[1] NCTA – The Internet & Television Association ("NCTA") submits this letter to respond to several arguments raised by commenters in their reply comments in the proceeding.

I. IN-KIND CONTRIBUTIONS

A. In-Kind Contributions Are Not Voluntary for Cable Operators.

Some commenters have objected to the Commission's tentative conclusion that cable-related, in-kind contributions are "franchise fees" subject to the statutory five percent franchise fee cap,[2] on the theory that franchise agreements are negotiated. These commenters argue that, because all franchise terms result from bilateral negotiations, they are in some sense voluntary and thus cannot be fees, taxes, or assessments "imposed" on cable operators within the meaning of Section 622(g)(1)'s definition of franchise fees.[3] These arguments should be given no weight.

First, the notion that a franchising authority should be allowed to impose franchise fees or requirements in excess of the five-percent cap so long as the cable operator agrees ignores the fact that the five percent cap on franchise fees reflects Congress's intent to protect both cable operators and cable subscribers from excessive taxation.[4] Accordingly, courts have held that the

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1 *See Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Second Further Notice of Proposed Rulemaking, MB Docket No. 05-311, FCC 18-131 (rel. Sept. 25, 2018) ("*Notice*").

2 *Notice* ¶ 16.

3 *See, e.g.*, Reply Comments of City of Philadelphia, Pa. et al., MB Docket No. 05-311, at 6 (Dec. 14, 2018) ("LFA Coalition Reply Comments"). Unless otherwise noted, all comments referenced in this letter refer to comments filed in MB. Docket No. 05-311 on or around November 14, 2018, and reply comments referenced in this letter refer to reply comments filed in the same docket on or around December 14, 2018.

4 *See* 47 U.S.C. § 542(g)(1) (defining "franchise fee" as "any tax, fee, or assessment *of any kind imposed* by a franchising authority or other governmental entity *on a cable operator or cable subscriber, or both* . . . .")

statutory cap cannot be waived as a matter of public policy, even if a cable operator were otherwise willing to agree to cable franchise fees or requirements in excess of that limit.[5]

Further, as NCTA has explained and the record in this proceeding amply demonstrates, franchise grant, transfer, or renewal proceedings are far from arms' length negotiations.[6] Cable operators have massive sunk costs in their networks and have little leverage to resist franchising authority demands when the only alternative is a loss of the right to do business in a community.[7] Many franchising authorities use this bargaining power to extract a wish list of financial and in-kind contributions. Simply calling these concessions "voluntary" does not make them so, or remove them from the scope of what Congress intended to be counted as a franchise fee. This is especially true given that franchising authorities treat these as fully enforceable obligations. As the Commission has tentatively concluded, Congress intended for all charges for the cable operator's right to use the public rights-of-way ("ROW") to be subject to the five percent cap – with the exception of PEG capital costs.[8]

Some of these commenters have also suggested that the court in *Montgomery County* held that assessments must be "unilateral" or "similar to a forfeiture" to count as franchise fees.[9] That misreads the decision. The court cited a number of dictionary definitions and discussions in prior case law involving enforcement and penalties, but its ultimate conclusion was that Congress defined "franchise fee" broadly in Section 622(g)(1) to include assessments "of any kind," which "need not be monetary [and] . . . can include noncash exactions."[10] The

(emphasis added); *City of Chicago v. Comcast Cable Holdings, LLC*, 231 Ill. 2d 399, 406 (2008) (noting that the "underlying purpose and rationale" for the franchise fee cap is to address "congressional concern over the misuse of franchise fees for revenue-raising purposes because excessive fees effectively created a regressive, indirect tax on subscribers").

5 *Cable TV Fund 14-A, Ltd. v. City of Naperville and Ameritech New Media, Inc.*, No. 96-C- 5962, 1997 U.S. Dist. LEXIS 11511 (N.D. Ill. July 29, 1997) ("[T]he five percent cap on franchise fees provided in Section 542(b) of the Cable Act may not be waived."). As NCTA explained in its comments and reply comments, cable operators often have no choice but to agree to unreasonable and illegal franchise terms, including in-kind contributions in excess of the five percent franchise fee cap, due to the imbalance in bargaining power inherent to franchise negotiations. It is therefore important for the Commission to reaffirm that its interpretations of the Cable Act reflect "matter[s] of statutory public policy and consumer protection" and that "neither a cable operator nor a franchising authority may waive these provisions." NCTA Comments at 55-59; *see also* NCTA Reply Comments at 35.

6 *See* NCTA Comments at 58-59; NCTA Reply Comments at 32-33.

7 Congress anticipated these issues and sought to address them through specific franchise renewal criteria under Section 626 of the Cable Act. *See* H.R. Rep. No. 98-934, at 27 (1984) ("Such a provision is necessary to protect the heavy investment made by cable operators in a cable system."); *id*. at 72 (expressing Congress's intent to "encourage investment by the cable operator at the time of the initial franchise and during the franchise term" and "ensure such investment will not be jeopardized at franchise expiration without actions on the part of the operator justifying such a loss of business").

8 *See* 47 U.S.C. § 542(g)(2)(C).

9 *See* LFA Coalition Reply Comments at 9.

10 *Montgomery Cty., Md. v. FCC*, 863 F.3d 485, 490-91 (6th Cir. 2017); *see also* NCTA Reply Comments at 4-6 (discussing *Montgomery Cty., Md. v. FCC*).

Commission's tentative conclusion is thus fully consistent with the *Montgomery County* decision.

B. The In-Kind Contributions Ruling Would Not Be Retroactive and Would Not Impermissibly Impair Existing Contracts.

Several commenters have suggested that the Commission's in-kind contributions proposal should apply only to future franchise agreements, arguing that the Commission cannot "retroactively" affect cable operator obligations or franchise fee revenues under existing agreements.[11] As NCTA explained in its reply comments, the Administrative Procedure Act ("APA") generally requires that legislative rules giving effect to statutory language may have prospective application only.[12] The Commission's tentative conclusion is fully consistent with this statutory principle. The ruling would have prospective effect only, and would not authorize cable operators to recoup the fair market value of in-kind contributions provided to franchising authorities in prior years. Rather, these contributions would only count against the statutory cap going-forward, to ensure that both new and existing franchise agreements comply with federal law. As the D.C. Circuit has explained, this prospective application of an agency ruling to existing contracts is permissible under the APA and well-established judicial precedent.[13]

Claims that the Commission's proposed ruling would materially upset franchising authorities' prior expectations under existing franchise agreements are also unfounded. Localities have no constitutional property right in franchise fee revenues that exceed the five percent cap established by Congress, and any claimed state or local right to additional fees would be preempted by federal law. In this regard, Section 636(c) of the Communications Act expressly preempts "any provision of any franchise . . . which is inconsistent with this chapter,"[14] and franchising authorities can have no protectable property interest in franchise conditions that conflict with federal law. Moreover, franchising authorities have been on notice

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[11] *See, e.g.*, Reply Comments of Association of Washington Cities et al. at 7-8.

[12] *See* 5 U.S.C. § 551(4) ("'Rule' means the whole or a part of an agency statement of general or particular applicability and *future effect* designed to implement, interpret, or prescribe law or policy.") (emphasis added); NCTA Reply Comments at 22-23.

[13] *See, e.g., NCTA v. FCC*, 567 F.3d 659, 670 (D.C. Cir. 2009). In *NCTA v. FCC*, the Commission had interpreted the Cable Act to prohibit certain exclusive contracts between cable operators and owners of multiple dwelling units. The D.C. Circuit upheld the application of this interpretation to existing contracts. Although the Commission's interpretation "significantly alter[ed] the bargained-for benefits of now-unenforceable" contract provisions, the court concluded that the Commission had "expressly consider[ed] the relative benefits and burdens" and determined that the rule's application to "existing contracts was essential" to ensure compliance with the statutory mandate and to avoid allowing the harms flowing from violations to "continue for years." *Id.* at 671. Here, too, NCTA expects that the Commission's new Section 621 order will reflect careful consideration of the relative benefits and burdens of its statutory clarification. With that record, the applicable precedent makes clear that applying the Commission's proposed rulings to existing franchise agreements to ensure compliance with the five percent cap would not be impermissibly retroactive.

[14] 47 U.S.C. § 556(c).

for over a decade that the Commission's orders implementing Section 621 may affect the kind of cable-related assessments subject to the statutory cap.[15]

Nor will the Commission's proposed ruling trigger the need for wholesale renegotiation of existing franchise agreements, as some have wrongly suggested.[16] Because franchise terms that violate the statutory cap are preempted, the legal consequence of the proposed ruling will simply require an adjustment of the monetary payments and in-kind contributions in existing franchises to ensure compliance with the cap, not a renegotiation of entire agreements.[17] Claims that this one-time adjustment process would be complicated and lead to disputes are also overstated. There are existing services in local markets that provide fair market value benchmarks for virtually all in-kind contributions. NCTA has previously submitted a chart identifying the valuation components of these in-kind contributions.[18] Cable operators and franchising authorities can work in good faith to account for any necessary adjustments in franchise fee payments within the framework of existing franchise agreement provisions and reporting practices.

C. Form 1240 and the FCC's Rate Regulations Do Not Prevent the Commission from Adopting Its Tentative Conclusion.

The City of Newton argued that the Form 1240 instructions and the Commission's rate regulations prohibit a rate-regulated cable operator from deducting cable-related in-kind contributions from its franchise fee payments.[19] The Form 1240 instructions require that "franchise-related costs" and "franchise fees" be reported separately.[20] The Media Bureau has previously determined that any costs reported as "franchise fees" may not also be reported as "franchise-related costs."[21]

As an initial matter, the vast majority of cable systems have been deemed to face effective competition, so the issue of reporting on the Form 1240 is only relevant in a small number of systems. Even there, the fact that a cable operator may have previously reported certain in-kind contributions as "franchise-related costs" on Form 1240 in no way ties the Commission's hands in this proceeding. Should the Commission adopt its tentative proposal, certain in-kind contributions would be deemed "franchise fees." Cable operators would therefore report them as such on Form 1240, even though they may have reported the same

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15 *See generally Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 5101 (2007) ("*First Section 621 Order*").

16 *See, e.g.*, Reply Comments of Association of Washington Cities et al. at 7-8.

17 *See, e.g.*, *NCTA*, 567 F.3d at 670-71.

18 See NCTA Comments at 53-55.

19 Reply Comments of City of Newton, Mass. at 6-9.

20 FCC, *Instructions for FCC Form 1240 Annual Updating of Maximum Permitted Rates for Regulated Cable Services* 27, https://transition.fcc.gov/Forms/Form1240/1240inst.pdf ("Form 1240 Instructions").

21 *Comcast of Minnesota Inc. Order Setting Basic Service and Equipment Rates, et al.*, Order, 20 FCC Rcd. 20157 ¶ 9 (MB 2005).

contributions as "franchise-related costs" in prior submissions.[22] Nothing that the Commission has proposed would require cable operators to report such costs under both categories in contravention of Media Bureau precedent.[23]

Moreover, to the extent that this adjustment to a cable operator's Form 1240 responsibilities could be characterized as a change in policy, that change is justified for the reasons set forth in the *Notice* – namely, to ensure compliance with Section 622 as Congress intended, to promote competition by fostering parity among intermodal competitors, and to ensure that franchise requirements do not discourage investment in new facilities and services.[24] The Commission's acknowledgement of, and reasoned explanation for, this change are all that is needed to address this issue.[25]

D. Concerns About PEG Programming Are Overstated, as Are Claims About Its Popularity with Cable Subscribers.

A number of commenters have suggested that the Commission's proposals threaten to eliminate PEG programming,[26] while others have suggested that PEG channels are a "marketing benefit for the cable operator."[27]

These comments miss the point of the Section 621 proceeding, which will not eliminate PEG programming and is not about the value of PEG programming to the community. The relevant question is how Congress intended the statutory cap on franchise fees to apply to cable-related in-kind contributions. The Commission's tentative conclusions on that question confirm that the Cable Act requires cable operators, unlike their video competitors, to provide adequate PEG support at a franchising authority's request.[28] Consistent with Section 622, the value of

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22 Relatedly, cable operators may project their future franchise-related costs on Form 1240. *See* 47 C.F.R. § 76.922(e)(2)(ii)(A). Where cable operators have done so, they must "true-up" their prior projections in subsequent Form 1240 filings. *See id*. § 76.922(e)(3). Once the Commission has adopted its proposal, subsequent Form 1240 filings will, for the reasons explained above, treat certain in-kind contributions as franchise fees rather than franchise-related costs for the first time. Accordingly, in their subsequent Form 1240 filings, cable operators may have to make some adjustments in truing-up their prior franchise-related cost projections.

23 Neither the Form 1240 Instructions nor any FCC rule affirmatively require cable operators to claim any particular franchise-related costs on Form 1240; both the instructions and the rules use permissive rather than mandatory language when addressing this point. *See* Form 1240 Instructions at 1-2; 47 C.F.R. § 76.922(e)(2)(ii). Thus, nothing would prevent a cable operator from reporting in-kind contributions as franchise fees (instead of franchise-related costs), should the Commission adopt its tentative conclusion that such contributions are, in fact, franchise fees.

24 *Notice* ¶ 1.

25 *See, e.g., NCTA*, 567 F.3d at 671 ("That agencies may change their minds is, after all, a matter of hornbook law.").

26 *See, e.g.*, Reply Comments of Free Press at 1; Reply Comments of the Greenlining Institute, Center for Media Justice, and Media Action Grassroots Network at 2.

27 *See, e.g.*, Reply Comments of Northern Dakota County Cable Communications Commission at 3.

28 47 U.S.C. § 541(a)(4)(B).

capital support for PEG construction-related costs does not count toward the five percent cap.[29] The Commission's proposal likewise confirms that the Cable Act requires cable operators to make PEG operating support available to PEG operators when requested by a franchising authority. Under the Commission's proposed ruling, if a franchising authority determines that PEG programming is valuable to its community, the cable operator will continue to provide operational support, just as it does today – but that support will now be properly counted against the statutory five percent franchise fee cap, as Congress intended.

Moreover, as NCTA noted in its reply comments, communities are also increasingly delivering PEG content direct-to-consumers via the Internet.[30] Some stream PEG video from their own websites or through major video aggregation sites like YouTube.[31] Such distribution methods provide an efficient way to reach a broader audience – PEG video can be accessed not just by cable customers, but by any broadband user anywhere in the country – and to deliver a wider range of video, including more hyperlocal content, alongside related non-video content. These new distribution methods can not only ensure that PEG content remains available in communities where it is valued, but can also contribute toward the modernization of PEG content to reflect the way today's consumers increasingly prefer to get their information. Indeed, efforts to expand PEG to the web have proven to be successful where undertaken.[32] Nevertheless, communities that want to continue distributing PEG content via a linear PEG channel, in lieu of or in addition to online or other distribution mechanisms, are free to allocate their franchise fees for such linear PEG operating support.

Several commenters have put in the record survey data suggesting that viewers place a high value on "local cable TV channels" with content featuring "residents, organizations, schools, government, events and issues."[33] The proponents claim that such survey data indicate

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29 *Id.* § 542(g)(2)(C).

30 NCTA Reply Comments at 8 n.26.

31 *See, e.g.*, Comments of the City of Laurel, Md., MB Docket No. 05-311, at 1 (Dec. 6, 2019) (stating that "many [viewers] also subscribe to the Laurel TV Official YouTube channel to watch shows and programs that originally air on Laurel TV"); *see also* LFA Coalition Comments at 11 ("Much of this programming is also available online and on mobile devices making the programming available to even more citizens."); *id*. at 11 n.52 (noting additional examples of PEG programming available online).

32 Cable operators have played a significant role in spurring the deployment of web-based PEG distribution. For example, Comcast piloted a PEG Online initiative consisting of custom-built websites that hosted a broad range of PEG video and other hyperlocal content. These online platforms provided expanded access to PEG content for those who wanted to view it, including both cable and non-cable users. Communities involved in the pilot have since integrated PEG content into their own websites. *See, e.g.*, Community Media Access Collaborative, http://www.cmac.tv (last visited Feb. 1, 2019); PhillyCam, https://phillycam.org/on-demand-2 (last visited Feb. 1, 2019); HTV Houston Television, http://www.houstontx.gov/htv (last visited Feb. 1, 2019). Similarly, Comcast subsidiary Nextdoor connects individuals at the neighborhood level in over 189,000 communities around the country, allowing people to follow and plan hyperlocal events, share hyperlocal information, and connect to others in their neighborhood. *See* Nextdoor, https://www.nextdoor.com (last visited Feb. 1, 2019). In addition, a small franchising authority in Tennessee recently reached out to Charter to ask how to cancel its government access channel on the cable system. That franchising authority found that the time needed to produce programming for the channel produces very little return and went on to explain that it has had more success with social media channels.

33 Comments of Anne Arundel County, Md. et al., Declaration of Sue Buske at 1.

the popularity of PEG channels. Again, the popularity of PEG channels is not a relevant issue in this proceeding. Moreover, the survey questions could reasonably be understood to be asking about any number of local broadcast or other channels with much more popular content than PEG channels.[34] Surveys posing generalized questions to unidentified members of the public about programming that may be PEG or may be local broadcast programming are not reliable indicators of actual viewership.

E. Any Compensation to Localities for the Operation of a Cable System in the Public Rights-of-Way Constitutes a Franchise Fee Subject to the Statutory Cap.

Some local governments have argued that settlement agreements through which franchising authorities and cable operators resolve alleged violations of franchise obligations are independent of any conditions imposed in a cable franchise, and that the Commission has no authority to disturb such agreements. These commenters contend that costs incurred as part of such settlements should not be considered franchise fees that count toward the five percent cap.[35] But as NCTA has previously explained, both Commission and federal court precedent make clear that the federal policies detailed in the Cable Act, including the statutory cap on franchise fees, may not be contracted around or waived.[36]

NCTA generally agrees that settlements may provide a mutually beneficial alternative to costly enforcement proceedings or litigation and should not count against the statutory cap, *provided that* the settlement is consideration for resolving genuine, bona fide, and timely-raised disputes and remains *entirely separate* from the consideration the cable operator pays in exchange for its access to and use of the public ROW. Franchising authorities should not be permitted to evade the statutory five percent cap by making baseless or trivial allegations of noncompliance or by claiming that certain cable-related in-kind contributions were the subject of separate negotiations, processes, or other subterfuge.[37] And any such allegations of violations should be handled in a timely way, with cable operators given a chance to cure any violations, and they should be resolved within the scope of the law and the terms of the franchise agreement. Thus, any in-kind contributions required in the context of the franchise agreement or any other

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[34] *See* NCTA Reply Comments at 9 n.28 (detailing the many flaws in the survey data submitted by Anne Arundel County).

[35] *See, e.g.*, Reply Comments of Anne Arundel County et al. at 18.

[36] NCTA Comments at 56; *see also Cable TV Fund 14-A, Ltd. v. City of Naperville*, No. 96 C 5962, 1997 U.S. Dist. LEXIS 11511, at *86 (N.D. Ill. July 25, 1997) ("[T]he five percent cap on franchise fees provided in Section 542(b) of the Cable Act may not be waived.").

[37] *See* NCTA Reply Comments at 34 ("The Commission should also clarify that any limitations on franchising authorities adopted in this proceeding cannot be evaded by claiming that cable-related exactions were the subject of separate negotiations, processes, or other subterfuge that some of the franchising authorities seek to exempt.").

agreement *as consideration for the cable operator's use of the public ROW* are subject to the cap.[38]

F. Other Objections to the Commission's Tentative Conclusions on Cable-Related In-Kind Contributions Are Similarly Misplaced.

Some localities have raised other objections to the Commission's proposed clarifications on cable-related in-kind contributions. Each objection is addressed below:

- **PEG Capital Costs.** Some commenters argue that the issue of which PEG-related expenses count as "capital" costs excluded from the franchise fee definition was "not a subject of the FNPRM" and is, therefore, outside the scope of this proceeding.[39] That is incorrect. The Commission raised this precise issue for comment in the *Notice*: "We understand that costs for studio equipment are treated as capital costs for purposes of Section 622(g)(2)(C) by both cable operators and LFAs given that most PEG facilities are already constructed. We seek comment on this practice."[40] Moreover, the record reflects clear examples of franchising authorities improperly conflating PEG capital and operating costs.[41]

- **Privacy, Customer Service, and Other Requirements.** Some commenters argue that the Commission's framework for in-kind contributions would allow cable operators to charge franchising authorities for the cost of fulfilling statutorily-authorized requirements, including, among others, customer service obligations and subscriber privacy protections.[42] But neither the Commission nor the cable industry has suggested that such costs should count toward the statutory cap. These requirements, like the line extensions discussed in the *Notice*, "are not specifically for

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38 Similarly, where a cable operator, solely of its own volition, makes *truly* voluntary contributions, or gifts, those contributions/gifts would not count toward the franchise fee cap. However, state and local authorities should be strictly prohibited from requesting that a cable operator provide any gifts, or voluntary contributions. Any such contributions or gifts should be allowed only if unilaterally offered solely at the discretion of the cable operator. As such, by their very nature, any gifts or contributions offered by the cable operator would not be enforceable by the franchising authority.

39 *See, e.g.*, LFA Coalition Reply Comments at 11.

40 *Notice* ¶ 19 n.95.

41 Documents filed by the City of Richland and obtained by the cable operator contradict the City's assertion that it had not stockpiled or misused PEG capital funds in the years leading up to franchise renewal negotiations in 2013. Those documents reveal that immediately after completing a total rebuild of its PEG facilities in 2010/2011, the City still had approximately $100,000 in PEG capital funds left over. The City added an additional $50,000 each year to this amount over the next two years, which led to the City facing the prospect of the franchise ending in 2013 with a PEG capital surplus of nearly $200,000. Internal documents show that the City decided to attempt to spend much of this money in the last few months of the franchise term, rather than return it to its residents as the franchise required. The City's own filings at the FCC show that it proceeded to spend nearly $100,000 in PEG capital funds in 2013, including nearly 30% on non-capital items like software and repairs, and on items the City acknowledged were "below [its own] capitalization threshold]." Despite these efforts, the City could not spend its entire surplus, ending 2013 with about $100,000 remaining in its PEG capital fund, which it did not return to its residents.

42 *See* Reply Comments of Massachusetts Community Media, Inc. at 7-8.

the use or benefit of the LFA or any other entity designated by the LFA, but rather are part of the provision of cable service in the franchise area."[43]

- **Regulating the Amount of Franchise Fees.** Some commenters suggest that, by specifying that franchise fee computations should be based on the fair market value of in-kind contributions, the Commission would violate Section 622(i). That provision prohibits federal agencies from "regulat[ing] the amount of the franchise fees paid by a cable operator, or regulat[ing] the use of funds derived from such fees, except as provided in this section."[44] This argument is another strawman. No one is proposing to regulate the amount of franchise fees (e.g., by limiting fees to four percent), or to specify how such revenue must be spent. The Commission is simply clarifying which costs count as franchise fees, a matter that is squarely within its authority as the expert agency charged with interpreting Section 622.[45] By providing clarification as to how in-kind contributions are to be valued for purposes of the statutory cap, the Commission is not determining either the "amount" or "use" of franchise fees collected by franchising authorities. Rather, the proposed clarification will simply ensure that such fees comply with the statutory limits that Congress adopted.

- **Existing Framework for Allocating the Cost of PEG Capacity.** One commenter argues that the *First Section 621 Order*, which determined that *non-cable-related* in-kind contributions are franchise fees subject to the five percent cap, deliberately treated *cable-related* in-kind contributions differently by establishing a *pro rata* contribution framework that allocates the cost of PEG capacity among incumbents and new entrants.[46] That is incorrect. The *First Section 621 Order* expressly *declined* to adopt a mandatory *pro rata* framework, despite numerous commenters urging the Commission to do so. Instead, the Commission merely stated that such a framework "is one reasonable means" to allocate these costs.[47] Moreover, even if a *pro rata* framework were used, nothing in the *First Section 621 Order* is inconsistent with what the Commission proposes here, as that prior order did not address whether a cable operator's *pro rata* share of PEG capacity costs would constitute a franchise fee subject to the five percent statutory cap.

II. MIXED-USE NETWORKS

The imposition of additional fees or franchise requirements for the provision of non-cable services by franchised cable operators is a growing problem. For example, in *City of Eugene v. Comcast of Oregon II, Inc.*,[48] the Oregon Supreme Court upheld the imposition of a seven-

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[43] *Notice* ¶ 21.

[44] 47 U.S.C. § 542(i).

[45] *See ACLU v. FCC*, 823 F.2d 1554, 1574 (D.C. Cir. 1987) (holding that the FCC has "the *ultimate* responsibility for ensuring a 'national policy' with respect to franchise fees") (emphasis in original).

[46] *See* Reply Comments of City of Newton, Mass. at 12-14.

[47] *See First Section 621 Order* ¶ 120.

[48] 375 P.3d 446 (Or. 2016).

percent tax on a cable operator's broadband revenues on top of the five-percent of cable revenues it was already paying in franchise fees to operate its cable system in the public ROW. Based on this ruling, the city was allowed to extract significant additional fees from the cable operator even though the broadband service imposed no new burden on the public ROW or the city's management of it. Not surprisingly, since this ruling, other communities in Oregon have followed Eugene's lead by imposing additional five- or seven-percent taxes on broadband provided through the operation of franchised cable systems.[49] In addition, the City of Rochester, New York recently imposed several new fees on the facilities and equipment of telecommunications providers, including cable operators, that purport to compensate the City for the use of rights of way, even though the cable operator has already paid a franchise fee for that use.[50] The continued spread of these discriminatory fees, which exceed and violate the franchise fee cap for cable operators, underscore the need for the Commission to act expeditiously to affirm that such additional fees on the operation of cable systems are barred by federal law.

A. A Local Government May Not End-Run the Cable Act by Pointing to Some Other Authority To Accomplish What Title VI Prohibits.

A number of commenters have argued that local governments retain broad police power that is separate from their Title VI cable franchising authority, and that the Commission cannot preempt the exercise of such power to collect additional fees from cable operators.[51] According to these commenters, the *Notice*'s tentative conclusion on mixed-use networks would also allow cable operators to install all manner of facilities and equipment in the public ROW without regard to safety and free of limits of any kind. These claims are inaccurate and overstated.

Section 622(g)(1) broadly defines franchise fees as fees imposed "by a franchising authority *or other governmental entity*."[52] The notion that franchise fees are limited to those imposed only by a franchising authority is thus contrary to the statute.[53]

Further, as NCTA has previously commented, there is ample case law supporting the principle that a local government cannot end-run the protections of Title VI by relying on some other non-franchising source of authority.[54] The Supreme Court made this clear in an analogous matter, rejecting the argument that a state could adopt, pursuant to its "broad powers" to regulate the transportation and importation of liquor under the 21st Amendment, regulations that conflict with the Commission's rules.[55] The Court emphasized: "[A]s we have repeatedly explained,

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49 *See* Letter From Rick Chessen, Chief Legal Officer, NCTA, to Marlene H. Dortch, Secretary, FCC, Re: LFA taxation of Non-Cable Services, MB Docket No. 05-311 at 1 (3/13/19).

50 *See id.* at 1-2 (further noting that Rochester requires this compensation to be paid in cash or, at the city's discretion, in the form of in-kind contributions of telecommunications facilities and/or services).

51 *See, e.g*., Reply Comments of Anne Arundel County et al. at 21; Reply Comments of Free Press at 7; Reply Comments of Massachusetts Community Media, Inc. at 11-12.

52 47 U.S.C. § 542(g)(1) (emphasis added).

53 *See Williams v. Taylor*, 529 U.S. 362, 404 (2000) (holding that, where possible, every word in a statute should be given meaning).

54 *See* NCTA Comments at 18-20 (discussing and citing cases).

55 *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 698, 708 (1984)

when federal officials determine, as the FCC has here, that restrictive regulation of a particular area is not in the public interest, States are not permitted to use their police power to enact such a regulation."[56] The same legal principle applies in this proceeding. Because Congress has expressly forbidden "a franchising authority or other governmental entity" from collecting franchise fees in excess of the five percent cap, a state or local government is not permitted to impose additional fees on cable operators in violation of that statutory limit under the guise of their police power or in the garb of an alternative regulator.[57]

Nor would the ruling the Commission proposes to issue authorize cable operators to place new installations in the public ROW without limit. Neither the Commission nor NCTA has proposed preempting a locality's ability to respond to and address legitimate public safety and welfare issues, such as road closures and traffic management during installation and maintenance of cable plant and enforcement of building or electrical codes.[58]

B. Fees for the Operation of a Cable System To Provide Broadband and Other Non-Cable Services Are Imposed on Cable Operators "Solely Because of Their Status as Such" Within the Meaning of the Cable Act.

The Cable Act Preservation Alliance ("CAPA") argues that the Commission's proposal to preempt right-of-way fees imposed on the provision of broadband and other non-cable services by franchised cable operators is inconsistent with the definition of "franchise fee" in Section 622(g)(1).[59] Because a fee can only be a franchise fee when it is imposed on cable operators "solely because of their status as such,"[60] CAPA contends that any fee that applies to other providers of a particular non-cable service may also be applied to cable providers without being subject to the five percent cap. This flawed interpretation of the statute largely tracks the reasoning adopted by the Oregon Supreme Court in *City of Eugene*.[61]

These erroneous views of the Cable Act are paradigmatic examples of why the Commission's proposed statutory clarifications are so essential. The *City of Eugene* court and CAPA have misconstrued both the scope of the statutory right that cable operators are granted under Section 621(a)(2) and the compensation mechanism that Congress established for that right under Section 622(b).

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56 *Id*. at 708.

57 *See, e.g., City of Minneapolis v. Time Warner Cable, Inc.*, No. CIV.05-994 ADM/AJB, 2005 WL 3036645, at *6 (D. Minn. Nov. 10, 2005) (rejecting as an "end run around preemption" a city's attempt to include cable modem service revenues in its assessment of franchise fees because "Congressional intent is completely defeated if a franchising authority can simply cite to another federal law or state law as authority to charge what Congress forbids").

58 *See infra* note 81.

59 *See* Reply Comments of the Alliance for Communications Democracy et al. at 20-21 ("CAPA Reply Comments").

60 *See* 47 U.S.C. § 542(g)(1) ("The term 'franchise fee' includes any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity on a cable operator or cable subscriber, or both, *solely because of their status as such*.") (emphasis added).

61 375 P.3d at 556-68.

As the Commission has tentatively concluded, consistent with Congress's intent and the scope of franchise rights conferred under Section 621(a)(2), the franchise fees that cable operators pay pursuant to 622(b) fully compensate localities for a cable operator's operation of its cable system in the public ROW to provide cable *and* non-cable services, such as broadband.[62] No one can reasonably question that cable operators pay the franchise fees authorized under Section 622(b) "solely because of their status" as cable operators. What the *City of Eugene* court and CAPA have failed to recognize is that the payment of these franchise fees is in exchange for the right, under Section 621(a)(2), to operate a cable system in the public ROW for *both* cable *and* non-cable services.[63]

Properly understood, therefore, the "solely because of" language encompasses all fees that are imposed on a cable operator for the operation of its cable system in the public ROW. When a locality imposes additional fees for the provision of non-cable services, such as broadband or telecommunications, on top of the five percent of cable service revenues authorized by Congress, the locality violates the statutory cap and impedes a cable operator from exercising the full scope of its rights to operate the cable system in the public ROW.[64] Multiple federal courts have upheld this correct interpretation of the statutory scheme.[65]

Besides failing to recognize the proper scope of a cable operator's rights under Section 621(a)(2), the Oregon court's reading of the "solely because of" language in *City of Eugene* (as also urged by CAPA here) is overly simplistic and cannot be harmonized with the rest of Section 622(g). Most critically, it ignores that a separate provision of the statute, Section 622(g)(2)(A), expressly addresses whether a fee is "generally applicable" to other entities or applies solely to

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62 *See* NCTA Comments at 8-16.

63 *Id.*; *see* 47 U.S.C. § 541(b)(3)(A)(i) (stating that a cable operator cannot be required to obtain a separate franchise to provide telecommunications services via its cable system); *id.* § 544(b)(1) (stating that a cable operator cannot be subject to franchise requirements for information services it provides via the cable system); *see also Liberty Cablevision of Puerto Rico, Inc. v. Municipality of Caguas*, 417 F.3d 216, 219 (1st Cir. 2005) ("The award of a franchise allows a cable operator to use, among others, the public rights-of-way." (citing Section 621(a)(2))); *id.* at 221 ("The Board, in granting a franchise to Liberty, enables Liberty to use the public 'rights-of-way' within the municipalities. Therefore, the municipalities' attempts to assess fees for use of these same rights-of-way are inconsistent with the Cable Act and are necessarily preempted."); *Nat'l Cable & Telecomms. Ass'n v. Gulf Power*, 534 U.S. 327, 332 (2002) (holding, with respect to any franchised cable operator, that "[i]f one day its cable provides high-speed Internet access, in addition to cable television service, the cable does not cease, at that instant, to be an attachment 'by a cable television system.' The addition of a service does not change the character of the attaching entity . . . .").

64 An entity may have "status" as a cable operator *either* due to its provision of cable services *or* simply due to its operation of a cable system. *See* 47 U.S.C. § 522(5) (defining a cable operator as either an entity that "provides cable service over a cable system" *or* "who otherwise *controls or is responsible for*, through any arrangement, *the management and operation of such a cable system*") (emphasis added). An entity operating a cable system to provide broadband is thus providing broadband solely because of its status as a cable operator.

65 *See, e.g.*, *City of Chicago*, 231 Ill.2d at 410-13 (holding that a fee was imposed on a cable operator "solely because of [its] status as such," because the company's provision of the cable modem service that made it subject to the fee in question was part of its management and operation of a cable system); *Comcast Cable of Plano, Inc. v. City of Plano*, 315 S.W.3d 673, 681 (Tex. App. 2010) (same); *City of Minneapolis*, 2005 WL 3036645, at *6 ("[A] a fee of virtually any kind targeting cable providers . . . is a franchise fee.").

cable operators.[66] If fees that apply to others and not just cable operators were already excluded from the definition of franchise fees due to the "solely because of" language in Section 622(g)(1), as the *City of Eugene* court and CAPA necessarily posit, there would be no reason for Congress to have separately addressed generally applicable fees in Section 622(g)(2)(A).[67]

Further, Section 622(g)(2)(A) makes clear that fees of general applicability may still be franchise fees subject to the statutory cap whenever their assessment is "unduly discriminatory against cable operators or cable subscribers."[68] Even if the "telecommunications fee" upheld in the *City of Eugene* decision could otherwise be characterized as a fee of general applicability because it applies to other broadband providers, the fee is unduly discriminatory as to cable operators (and thus a franchise fee) under this provision, because it is *on top of* the five-percent franchise fees cable operators already pay for their use of the ROW. In other words, it forces cable operators and their subscribers to pay two ROW use fees – one for cable service and a second for broadband service – while non-cable providers pay only the telecommunications fee for their use of the ROW.[69]

Nor can the "solely because of" interpretation adopted by the *City of Eugene* court and urged by CAPA be squared with Section 622(b), which Congress amended in the Telecommunications Act of 1996 ("1996 Act").[70] As NCTA has previously explained, this amendment capped franchise fee payments at five percent of a cable operator's gross revenues "from the operation of the cable system *to provide cable service*," rather than "from the operation of the cable system" as a whole.[71] Congress knew that cable systems were being used to provide broadband and other non-cable services, and it wanted to encourage the growth of such services in competition with other providers. At the same time, Congress determined that five percent of cable service revenues was adequate compensation for a cable operator's use of

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66 47 U.S.C. § 542(g)(2)(A) ("[T]he term 'franchise fee' does not include . . . any tax, fee, or assessment of general applicability (including any such tax, fee, or assessment imposed on both utilities and cable operators or their services but not including a tax, fee, or assessment which is unduly discriminatory against cable operators or cable subscribers.").

67 *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.") (internal quotation marks and citation omitted); *Williams*, 529 U.S. at 404 (holding that, where possible, every word in a statute should be given meaning); *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."); *Nat'l Cable Television Ass'n, Inc. v. FCC*, 33 F.3d 66, 75 (D.C. Cir. 1994) (directing that the Commission must take into account "the provisions of the whole law, and . . . its object and policy" in interpreting the Cable Communications Policy Act of 1984) (internal quotation marks and citation omitted).

68 47 U.S.C. § 542(g)(2)(A).

69 Nor does a fee for use of the ROW become a fee of general applicability solely because it is imposed on a class of entities larger than just cable operators. For example, fees imposed on all video providers for use of the ROW are still cable franchise fees under the Cable Act because they are compensation for the cable operator's use of the ROW to construct and operate a cable system. *See* NCTA Reply Comments at 30.

70 *See* NCTA Comments at 14-16.

71 47 U.S.C. § 542(b) (emphasis added). *Compare* Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 2, 98 Stat. 2779, 2787, *with* Telecommunications Act of 1996, Pub. L. No. 104-104, § 303(b), 110 Stat. 56, 124-25.

the public ROW to provide these cable and non-cable services. Allowing localities to impose additional fees on the operation of a cable system to provide such services, as the *City of Eugene* decision wrongly does, would directly contravene the purpose and intent of this amendment.[72] As one federal court held in rejecting a similar attempt by a local government to impose additional fees on cable operators for broadband and other non-cable services:

> [The amended] Section 622(b) clearly now provides that the franchise fee *on the entire system* cannot exceed five percent of the revenues derived from the provision of cable services only. To allow a municipality to impose on a cable operator another fee in addition to that authorized by [Section 622(a)], as capped under [Section 622(b)], would effectively permit the imposition of two franchise fees – one for cable services and the other one for non-cable services . . . . [N]on-cable services, including cable modem services, are not subject to franchise fees [and] any fee beyond a fee of 5% of the gross revenues derived from the provision of cable services is inconsistent with [Section 622(b)] and must be deemed preempted and superseded by the Cable Act.[73]

C. Congress Did Not Intend for Additional Fees To Be Imposed on Franchised Cable Operators' Provision of Telecommunications Services.

CAPA further argues that the 1996 Act's legislative history shows that Congress intended for localities to be free to charge fees for telecommunications services provided by cable operators that already pay franchise fees. This likewise tracks part of the court's erroneous reasoning in *City of Eugene*.[74] The relevant House Report passage states: "The conferees intend that, to the extent permissible under State and local law, telecommunications services, including those provided by a cable company, shall be subject to the authority of a local government to, in a nondiscriminatory and competitively neutral way, manage its public rights-of-way and charge fair and reasonable fees."[75]

Like the court in *City of Eugene,* CAPA fails to read this passage in proper context. Nothing in the quoted language indicates that Congress intended for cable operators to pay telecommunications fees *in addition to* franchise fees.[76] Rather, the passage largely restates the language of Section 253, which provides that: (1) all telecommunications services, including those provided by cable operators, are governed by Section 253;[77] (2) local government

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72 *See also* NCTA Comments at 7-26 (discussing myriad other Cable Act and Telecommunications Act provisions further confirming that the Commission's proposal to limit state and local authority over non-cable services and equipment deployed by franchised cable operators aligns with Congress's intent).

73 *City of Cincinnati v. Time Warner Cable, Inc.*, No. C-1-07-724, 2008 WL 11352596, at *4, *7 (S.D. Ohio July 1, 2008) (emphasis added) (internal quotation marks and citation omitted).

74 *See* 375 P.3d at 460.

75 H.R. Rep. No. 104-458, at 180 (1996).

76 Section 621(b)(3)(A) confirms this reading by prohibiting franchising authorities from requiring a separate franchise for telecommunications services provided by cable operators. 47 U.S.C. § 541(b)(3)(A)(i).

77 On its face, Section 253 expressly applies to "any entity . . . provid[ing] *any* interstate or intrastate telecommunications service," which includes many cable operators. 47 U.S.C. § 253(a) (emphasis added). *See*

management of the public ROW vis-a-vis telecommunications services is limited to "nondiscriminatory and competitively neutral" actions, and (3) fees for use of the ROW for telecommunications services must be "fair and reasonable."[78] Charging a cable operator a second fee to operate its cable system in the ROW when it has already paid for that right through franchise fees is not "fair and reasonable." Nor, in a competitive environment in which non-cable telecommunications service providers pay only one fee for ROW access, can charging franchised cable operators a second fee be "nondiscriminatory and competitively neutral."[79] The Commission's proposed mixed-use rule is consistent with both Section 253 and this legislative history, and it properly reads the statutory criteria in Section 253 in conjunction with the ROW rights and fees established in Sections 621 and 622[80] – something both the *City of Eugene* court and CAPA failed to do.[81]

III. OTHER ISSUES

A. The Commission's Proposed Clarifications Will Not "Commandeer" State and Local Officials.

A few commenters argue that the Commission's tentative rulings violate Tenth Amendment anti-commandeering principles,[82] which were recently restated by the Supreme Court in *Murphy v. NCAA*.[83] As a threshold matter, anti-commandeering principles apply to acts of Congress, so this kind of argument is necessarily directed primarily at the provisions of Title

also Letter from Rick Chessen, NCTA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 12 & n.39 (June 11, 2018) ("*NCTA June 11 Ex Parte*") (noting that "[m]any cable operators provide telecommunications services on a common carrier basis").

78 *See id*. § 253(c) (stating that state and local governments may require "fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for the use of public rights-of-way").

79 These statutory criteria in Section 253 effectively bar any arm of a "State or local government" from imposing additional fees for telecommunications services provided by a franchised cable operator. 47 U.S.C. § 253(c). Thus, the fact that Section 621(b)(3)(A) prohibits "franchising authorit[ies]" acting under *Title VI* from imposing such additional fees for the telecommunications services provided by cable operators, 47 U.S.C. §§ 541(b)(3)(A)(i)-(ii), does not leave state and local regulators free to do so under other claimed sources of authority, as some commenters have suggested in disregard of Section 253.

80 Claims that cable operators would have virtually no restraint on use of the public ROW under the Commission's proposal and could overburden it are entirely speculative and find no support in the record. Moreover, in such a theoretical instance, a locality may be authorized to charge additional fees consistent with the statutory framework, but *only* to the extent that it could demonstrate (per the statutory criteria in Section 253) that the telecommunications services and/or equipment subject to the fees are causing the locality to reasonably incur material additional ROW management expenses beyond what is already compensated by the cable operator's franchise fees under Sections 621 and 622. *See Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, WT Docket No. 17-79 & WC Docket No. 17-84, FCC 18-133 ¶¶ 78-80 (2018).

81 *See also* NCTA Comments at 21-26.

82 *See, e.g.*, Reply Comments of Anne Arundel County et al. at 14-15.

83 584 U.S. __, 138 S. Ct. 1461 (2018).

VI themselves, rather than any proposed action by the Commission.[84] In this proceeding, the Commission is simply clarifying the proper interpretation of certain Title VI provisions to ensure compliance with Congress's intent.

Title VI itself creates a comprehensive federal scheme for cable franchising. Thus, here, unlike in *Murphy*, no state is being forced to act in the absence of a federal regulatory program in violation of the Tenth Amendment.[85] Nor does any part of Title VI commandeer states to enact and enforce a federal regulatory program. It is well-established that, "where Congress has the authority to regulate private activity under the Commerce Clause, [such authority includes the] power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation."[86] A statute does not "become constitutionally suspect simply because Congress chose to allow the States a regulatory role."[87] Since its inception, the Cable Act has provided a framework for shared regulatory authority by the federal government and franchising authorities – whether state or local – that preserves the jurisdiction of franchising authorities to regulate and obtain compensation for a cable operator's use of the public ROW subject to certain federal limits, including the five percent cap on franchise fees.[88] The Commission has authority to interpret those federal standards, both through implementing regulations and the kind of interpretative ruling contemplated in the *Notice*. And Congress expressly preempted state or local laws or franchise conditions that are inconsistent with these federal standards.[89] The fact that state and local authorities must exercise regulatory authority in compliance with federal law flows from the Supremacy and Commerce Clauses.[90] The Commission routinely implements such statutory schemes consistent with the Tenth Amendment.[91]

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[84] *See Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Order Denying Motion for Stay, WT Docket No. 17-79 & WC Docket No. 17-84, DA 18-1240 ¶ 12 (WTB Dec. 10, 2018) ("*Small Cell Stay Denial*").

[85] *See* 138 S. Ct. at 1479-81.

[86] *New York v. United States*, 505 U.S. 144, 167 (1992) ("Congress's offer of shared regulatory authority does not run afoul of the Tenth Amendment.").

[87] *Islander E. Pipeline Co., LLC v. Conn. Dep't of Envtl. Prot.*, 482 F.3d 79, 92 (2d Cir. 2006) (citing *Hodel v. Va. Surface Mining & Recl. Ass'n*, 452 U.S. 264, 290 (1981)).

[88] *See id*. § 556(a)-(b).

[89] *See id*. § 556(c).

[90] *See New York*, 505 U.S. at 167; *Murphy v. NCAA*, 138 S. Ct. at 1476 ("[W]hen federal and state law conflict, federal law prevails and state law is preempted.").

[91] In *Montgomery County, Md. v. FCC*, 811 F.3d 121, 128 (4th Cir. 2015), for example, the Fourth Circuit rejected an anti-commandeering challenge to a Commission order construing Section 6409(a) of the Spectrum Act, because the statute simply "bars states from interfering with the expansion of wireless networks" and "preempts local regulation of collocations and bars states from denying facility modification applications that meet certain standards," and "[t]he FCC's order does no more than implement the statute." The court in *Montgomery County* also distinguished actions previously held to violate anti-commandeering principles on the grounds that "the Order does not require the states to take any action whatsoever." *Id*. at 129. The same is true here: The Commission is not requiring states or localities to take action; instead, it is clarifying that states and localities cannot act in certain ways that would conflict with the federal framework. *See also Small Cell Stay Denial* ¶ 12 (rejecting an anti-commandeering challenge to the Commission's rules interpreting Sections 253 and 332(c)(7),

The Supreme Court's discussion of the Airline Deregulation Act ("ADA") in *Murphy* is also instructive. As explained in *Murphy*, the ADA is an example of permissible federal preemption that does not run afoul of anti-commandeering principles. It "confers on private entities (*i.e.*, covered carriers) a right to engage in certain conduct subject only to certain (federal) constraints."[92] Like the ADA, Title VI confers on private entities (i.e., cable operators) federal rights to engage in certain conduct (i.e., the operation of a cable system in the public ROW to provide cable and non-cable services) subject only to specified federal limits (e.g., compensation for those rights of no more than five percent of cable service revenues). As the record in this proceeding demonstrates, the Commission's clarification of these statutory rights and limits is necessary to ensure that state and local governments regulate consistent with the federal framework established by Congress.[93]

B. The Commission Is Not Proposing Broad Preemption of Entire Statewide Franchising Regimes.

Some have suggested that applying the proposals in the *Notice* to state-level franchise authorities would result in the wholesale invalidation of state-wide franchising regimes.[94] This argument is another straw man. The Cable Act expressly provides that *both state and local authorities* are subject to Title VI's requirements.[95] The record contains clear instances where state and local franchising authorities have violated these requirements in their regulation of cable operators.[96] By confirming that its statutory clarifications apply to state-level franchising authorities, the Commission will simply be holding these regulators to the same federal statutory policies and limits as the states' political subdivisions, i.e., the local franchising authorities.[97]

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because "neither Sections 253 and 332(c)(7) nor the Commission's interpretations of those provisions require states and localities to carry out any specific policies or to approve any particular siting request.").

92 138 S. Ct. at 1480.

93 By contrast, the state gambling statute directly at issue in *Murphy* was "a direct command to the States" that "d[id] not confer any federal rights on private actors." Accordingly, that statute was held to violate anti-commandeering principles. *Id.* at 1481.

94 *See* Reply Comments of Anne Arundel County et al. at 25; Comments of the Michigan Public Service Commission at 6.

95 *See* 47 U.S.C. § 522(10) ("[T]he term 'franchising authority' means any governmental entity empowered by Federal, State, or local law to grant a franchise.").

96 *See, e.g.,* NCTA Comments at 26-28, 42-46; NCTA Reply Comments, Appendix at 1-14.

97 *See* NCTA Comments at 60-61. In many instances state law is consistent with federal law. An LFA, however, may act in contravention of both. For example, Florida's Consumer Choice Act limits local authority over cable operators that obtain state franchises, and prohibits cities from imposing, among other things, "taxes, fees, charges, *or other exactions* . . . in connection with the use of public right-of-way," with limited exceptions including any fees or exactions allowed under the statewide Communications Services Tax. See 610.114(1)(b), Fla. Stat. (general limitation); 610.106, Fla. Stat. ("Franchise fees prohibited")(emphasis added). The statewide tax provision prohibits LFAs that accept the tax from imposing any other form of "tax, charge, fee or other imposition," and expressly prohibits any "security fund" as a form of tax. 202.24(2)(b), Fla. Stat. Despite this clear prohibition, a recently enacted statute in Port Orange, Florida requires cable operators and others to pay a $50,000 security fund and attempts to defend its requirement under its permit power. City of Port Orange, Florida *ex parte* letter, Feb. 5, 2019. Port Orange's *ex parte* letter serves only to underscore the City's refusal to

The Cable Act further mandates that "any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this chapter shall be deemed to be preempted and superseded."[98] State and local franchise provisions that conflict with federal law are thus expressly preempted. Although the Commission's rulings may require conforming adjustments to certain state laws or franchise provisions that conflict with federal law, they would not broadly preempt state-level franchising regimes or require the wholesale renegotiation of franchise agreements.

* * * * *

The cable industry appreciates the Commission's interest in clarifying and reaffirming the limits that Congress has established on state and local government authority over cable operators and their cable systems. The record demonstrates a clear need for Commission action on these issues. NCTA urges the Commission to move expeditiously in issuing an order that formally adopts its tentative conclusions and proposals in the *Notice*.

Respectfully submitted,

/s/ Rick Chessen

Rick Chessen

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accept the limits of its authority to regulate cable operators imposed not only by the Commission, but by the state legislature from which it derives its franchising authority.

98 47 U.S.C. § 556(c).